

1949

Rocky Mountain Honey Co., Inc. v. Marion R. Crystal and Delsa N. Crystal : Brief of Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Rocky Mountain Honey Co. v. Crystal*, No. 7243 (Utah Supreme Court, 1949).
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**IN THE SUPREME COURT
of the
STATE OF UTAH**

**ROCKY MOUNTAIN HONEY COM-
PANY, Inc.,**

Plaintiff and Appellant,

vs.

**MARION R. CRYSTAL and DELSA
N. CRYSTAL, his wife,**

Defendants and Respondents.

BRIEF OF RESPONDENTS

FILED

Skeen, Thurman and Worsley,
and Edward G. Linsley,

JAN 15 1949

Attorneys for Respondents

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ROCKY MOUNTAIN HONEY COM-
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N. CRYSTAL, his wife,

Defendants and Respondents.

Case No. 7243

STATEMENT OF CASE

This action was brought by the plaintiff and appellant in the Third Judicial District Court at Salt Lake City, Utah, and involves a house and lot located at 645 North Second West in Salt Lake City. Although the complaint has six causes of action, the principal prayer is twofold: one, claim for the entire piece of property $3\frac{1}{2}$ rods x 10 rods, alleged to have been acquired by reason of a tax sale to Salt Lake City Corporation and a deed from Salt Lake City Corporation

to the appellant; and two, appellant prays that it be given an easement along the south boundary of the property in question. There were also claims for damages to personal property, actual and punitive, and a restraining order was sought. At the conclusion of appellant's case, respondents moved to dismiss all causes of action on the grounds among others that there was a total lack of proof. This motion was granted as to the first cause of action, which sought title by virtue of an alleged special tax deed from Salt Lake City Corporation. Thereafter, respondents presented their case as to the remaining causes of action, and at the conclusion thereof, the court made Findings of Fact and Conclusions of Law, and entered a judgment in favor of respondents accordingly on all remaining causes of action.

STATEMENT OF FACTS

(All italics, unless otherwise noted, are respondents')

The statement of facts set forth in appellants' brief, if in reality there is any such statement, is so brief it is deemed advisable to amplify same.

The property involved in this action, including the alleged easement across it, lies wholly within Lot 8 of block 138, Plat "A", Salt Lake City Survey. Block 138 contains 8 lots and lies between 5th and 6th North and 2nd and 3rd West Streets in Salt Lake City, Utah. Pugsley Street intersects this block through the middle in a north-south direction, and lots 2 and 7 abut this

avenue on the East, lots 3 and 6 on the west. Lot 8 lies to the east of lot 7, and abuts along 2nd West Street.

Appellant's exhibit T not scaled, is a very rough drawing of the property herein directly involved, as well as of adjacent property to the south and west. Appellant's exhibit S and respondents' exhibit 2 are abstracts of title covering these properties which contain a more accurate plat, so far as legal descriptions are concerned, at the back of each abstract.

The house and lot of respondents, at 645 North Second West Street, faces easterly on the west side of 2nd West with a frontage of 57.75 feet, and the lot extends east and west for the entire width of Lot 8, Block 138, or a distance of 165 feet. Immediately to the south of this area lies a house and lot belonging to appellant of about the same frontage, and also extending east and west the full width of Lot 8. To the west of both of these areas lies another tract of ground to which appellant claims title, whose north and south measurements equals the combined frontage measurement of the first two tracts mentioned, and which extends east and west the full width of Lot 7, Block 138, or a distance of 165 feet eastward from Pugsley Street.

A driveway extends westerly from 2nd West Street along the south side of respondents' house, and immediately adjacent to the south line of respondents' property for a distance of about one-half the lot depth, where it turns to the north and around the rear of the house, entering a garage. The claimed easement covers not

only this east-west portion of the driveway, but also an of it extension to the west clear to the extreme west edge of the respondents' property. Immediately parallel to this driveway and to the south lies another driveway serving the house and lot to the south, which extends from 2nd West in a westerly direction to a warehouse, the northeast corner of which is three or four inches and the northwest corner of which is about nine inches south of the dividing line between the two properties. See appellant's exhibit BB, a certificate of survey prepared at the request of the respondents, and R. 219. A so-called ditch slopes slightly to the west along the full north side of this warehouse or shed, and lies wholly upon the property of the south lot, which is not involved in this action, in this extremely narrow strip. Immediately to the west of this warehouse, which is referred to in the testimony as No. 1, and which was constructed about 1917 (R. 196), lies an additional warehouse, the north line of which is an extension of the north line of warehouse No. 1 and which was in turn constructed about 1937 (R. 210). This second warehouse lies wholly within the property to the west of respondents' house, which abutts on Pugsley Street and is within the limits of Lot 7, Block 138.

By Uniform Real Estate Contract dated and recorded October 24, 1941, the Campbell Commercial Company sold the respondents their house and lot, described as follows:

Beginning $2\frac{1}{2}$ rods North from the Southeast corner of Lot 8, Block 138, Plat "A", Salt

Lake City Survey, and running thence North $3\frac{1}{2}$ rods; thence West 10 rods; thence South $3\frac{1}{2}$ rods; thence East 10 rods to the place of beginning.

Thereafter, by Warranty deed dated and recorded March 23, 1944, the Campbell Commercial Company granted title to respondents to this property, which company had derived its title through grants running to the original patent (See abstract, exhibit 2). On September 3, 1946, Salt Lake City executed a quitclaim deed or disclaimer to Otto S. Grow, of such title as was acquired by special assessment levied in connection with Sewer Extension No. 437, (Exhibit G), who later quitclaimed to appellant, On October 3, 1946, the Utah Oil Company quitclaimed a right-of-way to Appellant "along the south line" of respondents' property (Exhibit H). There are a number of exhibits and some testimony relative to the levy, assessment and sale relative to Sewer Extension No. 437 made by Salt Lake City, but in the interest of logic and convenience of the court the details of these matters can be more adequately presented, it is believed, in connection with the argument relative to such interest as appellant claims Salt Lake City acquired through the sewer assessment and sale.

There is dispute in the testimony, to a limited extent, as to whether or not the west line of the respondents' property was so fenced or choked with debris as to preclude the passage of vehicles along the so called right-of-way lying on the extreme southerly portion of the property. Mr. William F. Weiler, property manager of Zion's Benefit Building Society, stated that between

the years 1933 and 1936 he visited respondents' property about once a month in connection with his duties (R. 270), and during such visit he noted the condition of all of these premises in connection with his duties at the time. The driveway extended from Second West Street west to a point about 40 feet east of the west property line, and then turned north around the house. (R. 272), and the entire west side of the property, including the southerly portion, was so overgrown with weeds and choked with debris, and was also fenced, that it would not have been possible to drive a car through this area (R. 273). Elva Turville actually resided in these premises from 1933 to 1935 (R. 295), and stated that the entire west end of the lot was blocked up with a "tumbled down old fence made of old boards and wagon wheels and ties" (R. 296). She also stated that during this period it was impossible to drive a car through the west portion of the lot (R. 298). Roland Turville, her son, also testified to the same condition (R. 306, 307). Mr. Harry C. Grider lived in the premises during 1939 or 1940 for a period of about 9 months (R. 309), and testified that a fence of sorts extended the entire length of the west property line when he lived there (R. 310). Mr. Walter L. Keil lived in the home immediately to the north of the premises from 1932 to 1946 (R. 313), and from the rear of his house had a clear view of the west end of the respondents' property (R. 313). He testified that during this period the entire west line of the respondents' property was barricaded and obstructed by railroad ties and berry bushes, with no opening, although a child could

crawl over it (R. 314, 315), and that a car could not pass (R. 316). Mabel L. Keil, wife of Walter L. Keil, testified to the same condition during the early years of their residence, (R. 327). Delsa Crystal, one of the respondents, moved into the premises with her husband in 1941, at which time there was an opening or gate in the south end of the fence, along the west line large enough for a car to go through (R. 349), which was closed by respondents in 1942 to prevent any vehicles from going westward to the property lying to the west of this fence (R. 349).

We should point out that there is some conflict in the testimony *after* the year 1936 as to the condition of the west line, when the additional warehouse was constructed to the west on the property in lot 7. It is also interesting to note that in 1916 one Cyrus Neal owned the property of both appellant and respondents fronting on 2nd West Street, and in granting the southerly tract now belonging to appellant, he also granted a right of way over the south four feet of respondents' property, apparently the intention being to create a joint driveway between the two places. The plan did not materialize, and this four foot easement was returned by grant in 1919. (R. 205, 206), and abstract, exhibit 2. Again, according to the testimony of Serge B. Campbell, president of the Campbell Commercial Company, which was the predecessor in interest of the present respondents, Otto Grow of the appellant company offered to purchase a right-of-way along the south line of the property here involved in 1939 for the sum of \$400

(R. 204), which was apparently to be used for purposes of driving trucks from Second West Street through and to appellants' warehouse to the rear of both appellant's and respondents' properties. Respondent refused such offer because of the obvious fact that they were attempting to improve the property surrounding their house (R. 373), and did not care to have their property spoiled by the passage of large trucks and other commercial vehicles.

Otto Grow of appellant company stated that certain injury was done to packing boxes and supplies located in the warehouse by virtue of the fact that a drainage ditch along the north edge of warehouse No. 1 became clogged and he was refused permission to go upon the respondents' property to clean the same, with the result that rain water accumulated and flowed into the warehouse in 1945. He testified that in 1917, the ditch was constructed four inches wide and one foot deep at the east end, and widened to nine inches at the west end of warehouse No. 1. Witness Weiler, (R, 273) could not recall even the existence of any ditch in this area between 1933 and 1936; witness Campbell could only recall a little depression in 1939 (R. 286); witness Elva Turville between 1933 and 1935 could not recall any ditch at all (R. 300); nor could witness Grider in 1939 and 1940 (R. 312); nor could witness Keil (R. 322). The damage occurred, moreover, at the time of a heavy storm throughout Salt Lake city in 1945, which washed out a portion of the city cemetery (R, 220). Mrs. Keil stated her recollection of the storm as one of water in the area like a mill race, flooding basements, drowning chickens, and

depositing debris of mud, silt and weeds over the lawns of the property in the area (R. 327, 328), and Mr. Kiel testified in the same vein, placing the mud depth of deposit at four or five inches. (R. 321). Respondent Crystal testified to the same thing, and also stated that the depression or ditch would have been inadequate to carry off the flood waters in any event, whether perfectly cleaned or not (R. 357). In addition, the dividing line between the lots abutting on 2nd West was separated by a cement coping, eight inches high on the south side, and twelve inches high on the north side, which extended eastward from the east side of warehouse No. 1. All the property of the area slopes wetward, and the flood entered at the east end of the warehouse (R. 220). Moreover, there was a wooden fence along the south property line and immediately north of the so-called ditch until 1937, when it was torn down (R. 218).

In 1937, Otto Grow had caused gravel to be placed along a part of the driveway with the full consent of the then owner of the property (R. 165). After 1942, respondent Marion Crystal removed cinders and big rocks, but not gravel, from the southwest corner area of the premises in connection with some landscaping he was doing (R. 373), all of which material removed totalled about a yard, or yard and one-half. Witness Campbell testified that he cleaned up the area in 1939, and there was no gravel of any kind in the area from which appellant claims it was allegedly moved (R. 289).

ARGUMENT

It is difficult to discern any correlation between the assignments of error, argument, and what apparently is a list of points argued in appellant's brief. In view of this, there seems no other logical way to present argument in respondents' brief except through an analysis of each separate cause of action. Appellant also complains as to the findings made by the court, but we cannot determine from the brief the specific points of complaint in this regard, and since the findings are clearly supported by the evidence, and with equal clarity support the judgment, we can perceive no reason for analysis of each and every finding, and the consumption of the court's time in this regard, when in reality there may be no disagreement at all.

FIRST CAUSE OF ACTION

A. There is no proof that notice of intention was ever given of the assessment of a special tax upon the property here involved.

As was pointed out in the statement of facts, the sole claim of appellant to the title of the entire tract of property owned by respondents arises by virtue of a quitclaim or disclaimer from Salt Lake City Corporation, affecting such interest as it in turn had acquired by virtue of sewer extension No. 437 and proceedings thereunder.

It was stipulated between counsel during the trial of the action that the applicable ordinances of Salt Lake

City should be deemed in evidence for the purpose of trial. Generally, the Revised Ordinances of Salt Lake City, 1920, were in effect during the years 1925 and 1926, the period of initiation of the special tax proceedings herein. On May 30, 1921, that portion of the Revision of 1920 dealing with special taxes was amended and revised, and continued in effect until a later Revision of the Salt Lake City ordinances in 1934. Hereafter, references in this brief to Salt Lake City ordinances will refer to the amendment of 1921, which is almost the same as the ordinances affecting this subject found in the 1934 Revision, although there are some differences.

Section 1735 of the Salt Lake City ordinances, as amended in 1921, provides for the notice of intention to make the special improvement. Proper notice is jurisdictional, and unless it is given the entire assessment and any proceedings taken thereunder are invalid, and may be collaterally attacked: *Jones vs. Foulger*, 46 Utah 419, 150 pac. 933; *Branting vs. Salt Lake City*, 47 Utah 296, 153 Pac. 995. Property may not be taken for a special assessment unless and until the owner of the property is given notice and opportunity to be heard before a competent and impartial tribunal. *Elkins vs. Millard County Drainage District*, 77 Utah 303, 294 Pac. 307.

The last paragraph of section 1735 provides as follows:

“Within five days after the first publication of such notice the city engineer shall furnish the

city recorder and city treasurer a list of the owners of the property within the district affected by such improvement, and the recorder shall within five days thereafter, mail post paid to each of said property owners a copy of said notice addressed to the last known residence of such property owner. The city engineer, shall, when directed so to do by the board of commissioners, prepare plans and specifications for said improvements."

There is no evidence in this record of any compliance with this portion of the ordinance. In an attempt, apparently, to prove such compliance, appellant introduced exhibit Y, which purports to be a copy of the notice and which is a printed document at the bottom of which appears the notation, "Notice mailed July 7, 1925. H. T." This is certainly no proof of any kind, and there is nothing in the record to indicate that the property owners affected ever received any notice at all.

Moreover, an examination of the notice, see exhibits Y and D, shows that the owners of property abutting on Second West were not in any way notified that their property might be affected by any levy. This notice states that there shall be a half rate applied on both sides of Pugsley Street from 5th to 6th North Streets, within this district, and no mention whatever is made of Second West Street. It is apparent that there was no possible benefit from a sewer on Pugsley Street to property abutting on Second West.

Thus, in *Jones vs. Foulger*, 46 Utah 419, 150 Pac. 933, the court states at page 425:

“Again, even in the general description, the property in the notice is limited to such as is ‘abutting thereon,’ that is abutting on Hudson avenue, the street which was to be opened. By referring to the plat it will be seen that plaintiffs’ property did not actually abut, that is, adjoin the proposed street. We need not pause now, however, to determine what property is ‘bounding, abutting or adjacent’ on or to a contemplated improvement within the purview of our statute. It is sufficient now to determine that the description contained in the notice of intention clearly and manifestly did not include the property of the plaintiffs as abutting property. That was also the view of the board of equalization, and likewise of the city council when the original ordinance was adopted. Had the city council thought that the property of the plaintiffs was included in the notice of intention, it would have levied the special tax thereon in the original ordinance, and no ‘amended’ ordinance would have been necessary. We thus have a clear case where by a general statement something may be deemed to be included which by a particular statement is, however, clearly and manifestly excluded. This case, therefore, must be regarded as though no notice of intention had been published in so far as the plaintiffs are concerned. If, therefore, the publishing of notice of intention is jurisdictional, the city council never obtained jurisdiction to levy the special tax upon the property of the plaintiffs, and hence the tax here in question is void. If the property of the plaintiffs could be legally assessed under the notice in question, we do not see why the board of equalization could not have recommended that any and all property ‘adjacent’ to the improvement should not also be assessed, and

the city council could have done so by adopting an 'amended ordinance.' To so hold would practically do away with the publishing of a notice of intention as required by our statute."

It is submitted that no notice of intention was given, and that this constitutes a jurisdictional defect rendering the entire proceedings invalid.

B. Sewer assessment No. 437 was never intended to and did not in any way affect the property here involved.

It will be recalled from the statement of fact, that all of the property with which we are here concerned lies within Lot 8 of Block 138. A casual glance at the record and exhibits clearly shows that the assessment for this sewer extension was levied upon Lots 2, 3, 6 and 7 of Block 138, and had no relation whatsoever to property in Lot 8.

Exhibit A is a copy of the ordinance levying the tax, dated September 15, 1925, and clearly shows the extent of assessment. This ordinance is required by section 1743 of the ordinances covering special taxes, and provides for the levy of tax. Section 1743 provides that after certain preliminaries have been complied with:

"... the board of commissioners shall pass an ordinance levying a special tax sufficient in amount to cover the cost of such improvements, as appears by the contract entered into for the performance of said work

“Said ordinance shall include:

“(c) A description of the blocks, lots or parts thereof, or pieces of ground affected or benefited by said improvement, and upon which said tax is levied. ”

The ordinance of exhibit A does describe the lots affected in detail, and reads as follows:

“AN ORDINANCE

“AN ORDINANCE LEVYING A TAX and for the assessment of property in Sewer Districts Nos. 1 and 2 (Sewer Extension No. 437) for the purpose of constructing a sewer.

“Be it ordained by the Board of Commissioners of Salt Lake City, Utah: Section 1. That the Board of Commissioners of Salt Lake City does hereby levy the tax and provide for the assessment of the same upon the property hereinafter described in Sewer Districts Nos. 1 and 2 (Sewer Extension No. 437) for the purpose of constructing a sewer, to-wit:

“..... Lots 2, 3, 6 and 7, of Blk. 138, Plat A, Salt Lake City Survey; abutting on both sides of Gale Street from 9th South to American Ave., both sides of American Avenue from 2nd West to Gale St., both sides of Pugsley Street from 5th to 6th North Streets
.....”

Again it is noted there is no inclusion of any property in Lot 8, and the above section contains all of the property described in Block 138. The assessment has

no more relevancy to Lot 8 than it does to property lying along 21st South Street. While assessments of this kind are made to the full depth of the lot affected, this of course does not and cannot extend that assessment to any other lot. A further consideration of Exhibit A shows that the first and final estimate which is made a part of this exhibit, and which shows in detail the footage of abutting property, *lists only* Lots 2, 3, 6 and 7 of Block 138. Another part of this exhibit shows the names and addresses of the property owners of the area, giving the lot and block of their holdings. Again this list *shows only* property in lots 2, 3, 6 and 7 of Block 138. In none of these documents is the slightest mention made of Lot 8. The exhibit also contains a NOTICE OF SPECIAL TAX which again *fails to list any property in Lot 8*, although it does cover Lots 2, 3, 6 and 7 of Block 138.

Again, the notice to property owners, *Exhibit E*, which initially sets forth that assessment for this sewer extension is about to be levied, reads as follows:

“Notice To Property Owners

Notice is hereby given that the assessment of a tax is about to be levied by the Board of Commissioners of Salt Lake City, Utah, upon the following property Lots 2, 3, 6 and 7, Block 138, Plat “A”, Salt Lake City Survey, for the purpose of constructing sewer, wherein assessment is made Pugsley St., 5th to 6th No.; etc.”

This clearly shows that all of the reference in this notice to any property in Block 138, is to property within Lots 2, 3, 6 and 7, and nowhere is Lot 8 mentioned.

Appellant complains of the ruling of the lower court on the ground that the same individual owned the property here involved and the piece lying to the west of it in Lot 7, and states that because of this, the assessment for the sewer for the full depth back of the lots involved included Lot 8. If the same individual happened to own all of the property lying a mile to the east, it would be quite as logical to state that the assessment extended that distance. It seems completely apparent that the assessment affected only Lot 7, and could not in any way affect Lot 8 which fronted on 2nd West Street and derived no benefit whatsoever from this sewer line. Appellant's contention is completely without merit.

C. Any interest acquired by Salt Lake City was lost prior to its attempted grant by redemption.

Another point deserves note in connection with this tax sale. Exhibit F is a tax sale redemption certificate dated May 5, 1943, redeeming the affects of the special tax sale for sewer extension No. 437 from the certificate of sale, exhibit GG, dated August 2, 1934. The quitclaim or disclaimer, however, from Salt Lake City to Otto Grow is dated September 3, 1946, Exhibit G. It thus appears that all of the property had been redeemed more than 10 years prior to the execution of this instrument from Salt Lake City, and if this is correct, no interest remained in Salt Lake City to quit-

claim, since the effect of the redemption was to divest the city of any such interest. It is, of course, fundamental under Utah law that the individual redeeming acquires no title or interest by virtue of such act.

D. There was a failure to comply with essential procedural steps relative to the acquisition by Salt Lake City of title to property through tax sale, rendering sale invalid.

While it may be that mere irregularities in some procedural steps outlined by our statutes, and ordinances enacted pursuant thereto, relative to special tax sales do not invalidate the sale, an examination of the record shows complete omission of several essential steps in the instant case. The extent and nature of omission goes far beyond anything that might be termed a mere irregularity. The absence of the proper jurisdictional notice of intention has already been noted, but there are other omissions which it is submitted are of an equally serious nature.

Section 1737 of the ordinances provides that before any special tax for special improvement shall be levied, the board of commissioners shall cause to be published a notice to contractors calling for bids which shall be published for a period of at least twenty days in each issue of a newspaper published in Salt Lake City. There is not a scintilla of evidence in the record that any such notice was ever given.

Section 1741 of the ordinances provides that the Board of Equalization after hearings on the proposed levy, shall report to the city commission any changes

or corrections made by it in the assessment list, and upon such report being made, the board of commissioners shall proceed with the levy of such tax. There is nothing in the record to show that the corrected assessment list was so reported.

Section 1750 provides:

“Notice of special tax. Immediately upon the receipt by the city treasurer of the certified copy of the ordinance levying a special tax or assessment, as provided herein, the city treasurer shall give at least five day’s notice in one or more papers having a general circulation in the city, of the time when such tax or assessment shall become delinquent; such notice shall be substantially in the following form:

NOTICE OF SPECIAL TAX TO WHOM IT MAY CONCERN

“Notice is hereby given that a special tax for the purpose of (here insert briefly a description of the improvement for which the tax is levied) has been levied by ordinance of the board of commissioners of Salt Lake City, Utah, which became effective on the.....

“Said special tax is levied upon the following described real property in Salt Lake City, to wit: (Here insert a full description of the property affected by the levy, according to lots, blocks or parts thereof, or pieces of ground *as the same may have been platted and recorded*), and is due and payable in equal annual installments, beginning.....

“Interest at the rate of . . . (not to exceed seven) per cent per annum on the whole amount

of said tax shall be computed from the date the ordinance levying said tax becomes effective, to wit: the.....day of..... 19.....; and interest at said rate on the whole amount of said tax unpaid shall be due and payable with each installment.....If any installment or the interest aforesaid is not paid on the date when the same becomes due, then the whole amount of the tax unpaid at the time said installment and interest are due will become due and payable, and will draw interest at the rate of ten per cent per annum until paid. One or more of said installments in the order in which they are payable aforesaid, or the whole tax, may be paid at any time within fifteen days after the ordinance levying the tax become effective, without interest; and one or more of said installments in the order in which they are payable, or the whole tax unpaid, may be paid on the day any installment is due, by paying the amount thereof and interest to said day. If said tax is not paid when due I shall proceed at once to collect same with interest and costs, as provided by law and ordinance.
.”

Exhibit W is apparently the only proof of compliance with this section. It will be noted that there is nothing in the exhibit to show that the very purpose of the section, namely to enable property owners to determine when the tax becomes delinquent, had been properly presented to interested parties. In net effect, there is no proof that this notice was ever given. Moreover, the section requires a description of the property by lots and blocks, but this apparently was not done. It is true that Exhibit A contains a notice which follows

the requirements of the section above, *but there is nothing to show it was published as it appears in Exhibit A.* As has been previously noted, moreover, this delinquent notice in Exhibit A is a notice that taxes are delinquent, *not on Lot 8, but on lots 2, 3, 6 and 7 of Block 138.*

Section 1751 of the ordinances requires the city treasurer to deposit in the mails postpaid and addressed to the several owners of the property affected by the levy, as they appear on the records of the county assessor, a personal notice, containing the facts relating to the assessment and substantially in the form provided for the published notice above. Exhibit V is apparently the proof of this mailing, but consists of an affidavit attached to a blank printed form, and does not in any way indicate that a single notice was mailed to any particular property holder affected by this levy.

Section 1752 of the ordinances provides:

“Within ten days after the date of delinquency, as fixed in the levy and notice of tax, the city treasurer shall proceed to make up a list of all property upon which the special tax remains due and unpaid, and upon completion cause the same to be published in some newspaper having general circulation in the city, daily thereafter for a period of ten days.”

.”

As this court stated in *Peterson vs. Ogden City*, 176 P. 2d 599, 603, 604:

“Plaintiff makes two arguments for laches or estoppel. The first is that that part of Section

20 of the ordinance which says, 'Ten days after the date of delinquency as fixed in the levy and notice of tax, or thereafter, the City Treasurer shall proceed to make up a list of all property upon which special taxes remain due and unpaid, and upon completion cause the same to be published once in some newspaper having general circulation in Ogden City,' is mandatory and the failure of the treasurer to act within the time provided defeats the lien. Technically, this is not an argument for 'laches' or 'estoppel' as those words are ordinarily used but rather an argument that the city has failed to comply with a mandatory statutory provision and has therefore lost its lien.

"We agree that the treasurer must comply with Section 20 in order to make a valid sale of the property for special taxes.
"

Exhibit B is an affidavit of publication of this delinquency notice. It was not published for a period of ten days at all, but as appears from the affidavit only in one issue of the Deseret News, on July 30, 1934, nor can it be determined from the record that even this one publication was within 10 days after date of delinquency.

It will be observed that time and again in the course of procedural steps there has been a failure to give the property owners affected by the levy a notice of the status of the levy as required by the ordinances. Appellant's brief takes the position that all of these omissions are mere irregularities which can have no

ultimate effect on the tax sale. If this were true, then the only step required under such reasoning would be that of acquiring a valid notice of intention. We do not believe this is the law, and believe that these additional steps and notices are as essential to continuing jurisdiction as the original notice of intention.

Appellant cites the case of *Stott vs. Salt Lake City*, 47 Utah 113, 151 Pac. 988 for the proposition that in a case of this kind irregularities in the absence of fraud, mistake or gross injustice, are not available to one contesting a tax deed. In the Stott case, the essential controversy arose over whether or not the sidewalk had been constructed in conformity with the type specified in the notice of intention, and the evidence showed that although there had been some structural change, the sidewalk as constructed was equally as serviceable as that of the notice. The suit, moreover, was not one determining the validity of a tax sale, but was an attempt on the part of property owners to restrain and enjoin the collection of the special levy. Irregularities of the type involved in that case are entirely distinct from the failure, as in the instant case, to conform to the various steps required to effect a valid tax sale.

Appellant further cites *Branting vs. Salt Lake City*, 47 Utah 296, 153 Pac. 995, for the same proposition. That case was an attempt to annul certain ordinances and proceedings in connection with a special tax. The

language of the case itself clearly indicates the issues, at page 298:

“While it is not disputed in the complaint that the appellant had complied with all the jurisdictional steps required by our statute to authorize it to order the sewer constructed and to make the assessment and to levy the special tax to pay therefor, yet it is alleged that the appellant exceeded its jurisdiction or authority in making an assessment and in levying a tax in excess of a certain amount as hereinafter stated.”

Again the type of irregularity was something entirely distinct from the complete omission of necessary procedural steps, which is the question here involved, and it submitted that the case is for that reason entirely irrelevant.

Appellant also seems to take the position in its brief, page 9, that the burden is upon the respondents to prove wherein the tax proceedings are invalid. We believe the record clearly shows this failure, but submit that under well established Utah law a person who seeks to set up a tax title in himself must prove that all procedural steps to perfect that title have been fully complied with.

Thus in the early case of *Eastman vs. Gurry*, 15 Utah 411, 49 Pac. 310, the court stated at page 417:

“Many of these questions arose and were decided in the case of *Olsen v. Bagley*, 10 Utah 492. In that case the court held that ‘tax sales are made exclusively under statutory power, and,

unless all the necessary prerequisites of the statute are carried out, the tax sale become invalid. If one of the prerequisites fail, it is as fatal as if all failed. The power vested in a public officer to sell land for the nonpayment of taxes is a naked power, not coupled with an interest, and every prerequisite to the exercise of the power must precede its exercise. The title to be acquired under statutes authorizing the sale of land for the nonpayment of taxes is regarded as stricti juris, and whoever sets up a tax title must show that all the requirements of the law have been complied with.' ''

See *Tinctic Undine Mining Co. vs. Ercanbrack*, 93 Utah 561, 74 P. 2d 1184.

Appellant also complains, brief, page 11, that the court erred in not requiring respondents to reimburse appellant for the amount of taxes allegedly paid by it. The reason the court did not do so is apparent, and as was pointed out above, this assessment was never levied upon nor intended to cover Lot 8, which derived no benefit from said sewer. There was obviously no occasion to reimburse appellant for taxes which never existed so far as this property is concerned.

SECOND CAUSE OF ACTION

A. There is a failure of proof to establish an easement of any kind in behalf of appellant over the property of respondents.

The pleadings in regard to the second cause of action fail to specify in any way the basis under which appellant claims an easement over respondents' prop-

erty. While it is believed this is necessary, apparently on the trial of the action this cause of action was based upon a quitclaim deed dated October 3, 1946 from the Utah Oil Refining Company, Exhibit H. An examination of the deed shows that it does not purport to grant a right-of-way over the south ten feet of the property, but vaguely "along the south line". In any event, the record and this exhibit clearly indicates that no interest passed by this deed because the Utah Oil Refining Company never possessed or intended to own such a right of way.

Exhibit 1, introduced by respondent, is an agreement between the then owner of the property and the Oil Company dated September 17, 1923. The exhibit obviously concerned the use of underground waters. Mr. Robert G. Clark, Chief Engineer, Utah Oil Refining Company, testified that during the early 1920's the company was pumping water from its wells near the refinery, with the resultant lowering of the water table in adjacent areas. The property here involved was within those areas, and the then owner commenced a suit against the company seeking damages for this drain upon the underground waters. The recitals of the instrument itself and the testimony of Mr. Clark (R. 257 to 259), make this clear. In settlement of that lawsuit, and to grant to the Oil Company certain underground water rights, exhibit 1 was executed. The language of

the granting clause and one additional paragraph (the instrument is not herein set out in full) is as follows:

“And said grantors have granted, sold, conveyed and quitclaimed, and by these presents do grant, sell, convey and quitclaim to the Utah Oil Refining Company, a corporation, grantee, all of the right, title and interest of said grantors and of each of them in and to all of the artesian, percolating and natural subsurface waters, appurtenant to, belonging to, or underlying and contained in the so called Artesian Basin, and other artesian basins, as same underlies Blocks 115, 116, 117, 119, 120, 121, 132, 133, 134, 137, 138, 139 and 151, Plat A, Salt Lake City Survey, being a survey of part of Salt Lake City, Salt Lake County, State of Utah, and particularly all of the right, title and interest of said grantors in and to said artesian, percolating and natural sub-surface waters appurtenant to, belong to, underlying and contained in the following described property in said city, county, and state, to-wit:

“Commencing 14 rods South from the northeast corner of Lot 8: Block 138; Plat A, Salt Lake City Survey, and running thence West 19 Rods, thence South 6 rods, thence East 9 rods, thence North $3\frac{1}{2}$ rods, thence east 10 rods, thence north $2\frac{1}{2}$ rods to the place of beginning, together with a right of way along the South line of the East 10 rods thereof, Eastward to Second West Street.

.

“For said foregoing considerations grantees may drain said described lands of sub-surface and percolating water so far as can be done from

underground, *but without going on said premises to dig or make drains or otherwise interfere therewith.*”

The clear intent and legal effect of this document is apparent. It simply grants to the Utah Oil Refining Company underground water rights which lie beneath certain property particularly described by metes and bounds, which description at its conclusion mentions a right of way along the south line of the property. This right-of-way along the south line is simply part of the area described from which the water rights, lying underneath the property, are to be taken, and there is nothing in this grant to show that it conveyed any interest in realty as such, merely water rights. It is not a grant of a right-of-way, but of water rights lying underneath the described property. The mention of right-of-way is an integral part of the paragraph describing the property. Not only this, but the later paragraph specifically denies the grantee the right to go upon said premises or “interfere therewith”. This is scarcely consistent with a right-of-way to go upon the premises.

Even if this language could be construed as a grant, and is it submitted that it cannot be, the only conceivable purpose of such a grant would be to go upon the land for uses in connection with the use of underground waters, not a general easement as appellant seeks to establish. *American Jurisprudence* makes this clear. Thus at 17 Am. Jur. 996, sec. 98:

“The use of an easement must be confined strictly to the purposes for which it was granted

or reserved. A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden”

Moreover, there is abandonment of any easement that might conceivably have existed. *Ruling Case Law* states the well established rule, at 9 R. C. L. 812, sec. 68 as follows:

“An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case; and, as a rule, no one case can be authority for another. Time is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important, and a cessation of use for a term less than the prescriptive period, accompanied by acts clearly indicating an intent to abandon the right, will work an extinguishment of the easement”

Mr. Clark of the Oil Refining Company testified that there was never any user made by that company from the time of the grant to time of executing the instrument of conveyance to the appellant in October,

1946, and to time of trial. His testimony clearly showed that the Oil Company had neither need nor use for any right-of-way and never at any time asserted itself the possessor of such a right. The testimony of the other witnesses showed that the right of way was blocked at the west end during the 1930's by a specie of fence and rubbish, and in 1942 the present respondents replaced the block of the right-of-way, which continued to the time of trial.

There is an additional factor. It is evidenced by the record (Exhibit S) that respondents and predecessors in interest have paid taxes on the property in question, have protected it by a substantial enclosure, have cultivated and improved it, have expended labor and money upon it, and have adversely held it against all other persons, including the Utah Oil Company, for the statutory time of adverse possession. See Section 104-2-7 U.C.A. 1943.

THIRD CAUSE OF ACTION

The allegations of the third cause of action are identical with those of the second cause of action, except that the right-of-way is described as being 10 feet wide, more or less, rather than 10 feet wide. The argument herein, relative to the second cause of action, is therefore adopted for the third cause of action.

FOURTH CAUSE OF ACTION

A. There is a failure of proof to establish an easement of any kind in behalf of appellant over the property of respondents by prescription.

Apparently the theory of the fourth cause of action is that the appellants have acquired a right-of-way over respondents' property by virtue of prescription and adverse user over a period of more than twenty years.

The recent case of *Bertolina vs. Frates*, 89 Utah 238, 57 P. 2d 346, clearly sets forth the rules of law applicable to acquisition of an easement by prescription. Thus at page 348, the court states:

“Where a person claims to have acquired an easement by prescription over another's land, he must show that he has acquired it by his own continuous, open, uninterrupted, and adverse user under claim of right for the twenty-year prescriptive period. The prescriptive right is based originally upon the theory of a grant implied from long user. *Funk v. Anderson*, 22 Utah, 238, 61 P. 1006. It runs to the individual and not to the public. Mr. Washburn, in his work on *Easements* (4th Ed.), sec 43, p. 164, says: ‘But one can not claim a right of way as a private one by showing that it had been used by the proprietors of other lots than his own, He must show a user by himself or his predecessors of the way to his own lot under a *claim of right* for the requisite period of time, continuously, by the acquiescence of the owner of the land over which it lies.’

“Everywhere in the books the statement upon the creation of a prescriptive right is: That it

must be adverse, not by license or favor, under claim or assertion of right, hostile to the right of the owner so as to expose the claimant to an action of trespass if his claim is not well founded. A user by an individual which is not distinguished from that of the public will be considered permissive and not adverse unless there is evidence that it was under a claim of right in himself and that the owner knowing of such claim acquiesced in it. Authorities should be unnecessary to demonstrate that principle. The mere statement of the conditions under which the prescriptive right may be acquired negatives the idea of user by others either adding to or detracting from the rights of a particular claimant.”

The court continues at page 349, relative to unity of ownership:

“Unity of possession and ownership prevents the acquisition of a prescriptive right. As the book say: A man cannot prescribe against himself.”

And at page 350:

“It thus appears from the evidence that there was a unity of title and possession of the tracts owned by plaintiffs and these defendants down to the year 1896 and again from 1910 to 1919. There is no period in the history of the title to these tracts when the prescriptive right could have been acquired. Unity of possession and ownership, as heretofore indicated, defeats the running of the prescriptive period.

“‘An owner of land can not have an easement in his own estate in fee, for the plain and

obvious reason that in having the *jus disponendi* — the full and unlimited right and power to make any and every possible use of the land — all subordinate and inferior derivative rights are necessarily merged and lost in the higher right * * *: Accordingly when the owner of an estate enjoys an easement over another estate and acquires title to the latter the easement is thereby extinguished.' 19 C. J. 945, sec. 156."

In the case before the court, the record clearly discloses that the west portion of the land which appellant contends is the dominant tenement and which lies in Lot 7, and the east portion of the land over which the easement is claimed, which lies in Lot 8 and now belongs to Respondents, were joined as one piece as late as 1929. Exhibit S, which is an abstract covering both the properties in Lot 7 and Lot 8, clearly shows that until 1929, Cyrus Neal owned all of this property. He acquired the southerly portion of the entire tract on March 2, 1910, see entry 16 of said exhibit, and the northerly portion on April 21, 1916, see entry 23. He owned all of this property until July 8, 1929, when he conveyed the westerly portion lying in Lot 7 to one Byron D. Nebeker, see entry 32. No prescriptive period could possibly commence to run, therefore, until the year 1929, and there could obviously not be twenty years adverse user by the year 1946. On this ground alone there is complete failure of proof.

There is an even more complete failure of proof to show continuous and adverse user by appellant or its predecessors in interest. The statement of facts has set

forth in detail the testimony of a great number of witnesses to the effect that during the period of the 1930's the west end of the alleged right-of-way was so choked with debris, wagon wheels and remnants of an old fence that it was impossible to drive any sort of vehicle through the area. While there was some testimony that vehicles of appellant had driven through the area in 1937 and a few later years, the driving was sporadic and seasonal. In this connection, it is pointed out that the conflict which appears for a few of these years in the testimony was resolved by the action of the trial judge in his findings and judgment in favor of respondents. He had an opportunity to observe the witnesses on the stand, their demeanor and apparent credibility, and there is certainly a tremendous amount of testimony clearly showing the blockage during this period. Actually, there is no proper testimony at all in the record showing any continuous adverse user as a right-of-way for vehicles for twenty years, and the attempt to prove this produced, particularly before 1936, proof of the passage of children getting groceries or of Otto Grow occasionally *walking* a part of the way along the south part of the lot to go to work. Moreover, it is clear from the record that whatever sporadic and uncertain passage there might have been was with the full consent of the predecessors in interest of respondents' property, until respondents closed the right-of-way by boarding it up in 1942. See R. 163. This is of particular interest in such conflict as developed after the year 1937. See, for example, R. 158. It is submitted that there is a complete

lack of testimony to establish a prescriptive easement under the applicable rules of law, particularly as set forth in *Bertinola vs. Frates*, supra. See *Lund vs. Wilcox*, 34 Utah 205, 97 Pac. 33; *Farr vs. Wheelwright Construction Co.*, 49 Utah 274, 163 Pac. 256.

FIFTH CAUSE OF ACTION

A. There is no evidence to support a restraining order against respondents or to form the basis for damages to personal property.

The fifth cause of action seeks an order restraining the respondents from placing debris or material in the ditch or depression which lies along the north side of appellant's warehouse No. 1 which is located on property to the south of that belonging to respondents, or from interfering with appellant's access thereto for purposes of cleaning the same. Punitive and actual damages are also sought by reason of alleged flooding of the warehouse because the ditch was allowed to become clogged with debris.

At the outset, it is clear that this so-called ditch lay wholly upon the land of the appellant, next adjacent to respondents' south property line. Thus at page 219 of the record, Otto Grow testified as to the location of the ditch, and it is not contradicted:

“Q. And you say this ditch was contained entirely within your own property?

A. Yes, that is the way we figured when we surveyed to remodel this building on the north side. Your survey shows that was on our property.

Q. This property, then, would be on that stretch three inches wide on the east and about eight or nine inches on the west?

A. Yes.

Q. That is where the ditch runs?

A. Yes.”

The right to clean the ditch is clear, provided appellant did not trespass upon the property of the respondents to do so. If it had such a right to come upon this property to clean the ditch, it could only arise in the nature of an easement, through twenty years prescriptive usage. The evidence in the record in this regard seems to be in the testimony of Edward J. Burke, R. 99, 100, that two to four years prior to the time of trial Delsa Crystal told him to leave the premises of respondents when he was cleaning out the ditch, and again in the testimony of Otto Grow, R. 172, that he had overheard Delsa Crystal tell Burke to get off the property, about a year prior to the trial. Whether these incidents are one and the same is not entirely clear. There is clearly a lack of evidence to show twenty years user within the meaning of the rules of law applicable to prescription.

So far as the claim that respondents had placed, themselves, debris in the ditch is concerned, there is not a scintilla of evidence in the record to support any such claim, and appellant has pointed to none. Appellant in its argument at page 13 of its brief on the fifth cause of action also states that respondents admit removing gravel supporting the side of the ditch, and directs the

court's attention to page 61 of the record. R. 61 contains at the top of the page the findings of the trial court in respect to the sixth cause of action, which reads as follows: "and that defendants removed during the year 1942 from the westerly one-third of said right-of-way cinders and loose sand".

There is no proof that any damage to merchandise in the warehouse by flooding was caused by any act of the respondents. The statement of facts shows clearly that there was serious doubt as to whether or not the ditch was anything much more than a shallow depression, that the damage was done during the course of a violent rain storm which piled a great depth of water in the area and deposited four to five inches of silt on the lawns, and that whether the ditch or depression was clear or obstructed would have had no bearing on its ability to handle the volume of water of the storm or flood at the time the damage was done,

SIXTH CAUSE OF ACTION

A. There is no proof of any damage to appellant by virtue of removal of gravel from alleged right-of-way.

In the sixth cause of action appellant seeks both punitive and actual damages for the removal of gravel from the westerly portion of the alleged right-of-way area. For reasons which have heretofore been argued at length, it is submitted that appellant had no right, title or interest in or to any part of respondents' land, by easement or otherwise. The fact that the respondent

Marion Crystal removed a yard or yard and one-half of material, which he testified was cinders and loose sand from this area to another part of the yard for leveling and landscaping work clearly gives no cause of action for damages. It is also noted that any such cause of action could in any event only have arisen in favor of Otto Grow, the individual who claimed he caused the gravel to be placed on the area in 1937. He is not a party to the action.

In conclusion, it is submitted that the judgment of the lower court should be fully sustained, since entirely consistent with the evidence and the rules of applicable law, and that respondents should be awarded costs on this appeal.

Respectfully submitted,

Skeen, Thurman and Worsley,
and Edward G. Linsley,

Attorneys for Respondents